Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Protecting the Privacy of Customers of	)	WC Docket No. 16-106
Broadband and Other Telecommunications	)	
Services	)	

COMMENTS AND REPLY COMMENTS ON PETITIONS FOR RECONSIDERATION OF ORDER
of Justin (Gus) Hurwitz[1]

The Commission is currently reconsidering rules adopted in a 2016 Order ("Privacy Order," "Order," or "Privacy Rues," or "Rules") that imposes privacy related obligations on Broadband Internet Access Service (BIAS) providers (also known as Internet Service Providers (ISPs)).[2] These comments are submitted in support of this reconsideration and in reply to other comments submitted in opposition to it.

There are myriad problems with the Privacy Order: it fails to sufficiently consider, let alone address, substantial criticism of both that rationale for the Privacy Rules and the Rules themselves; it implements rules that needlessly, confusingly, and without sufficient justification differ from rules implemented by the FTC; it treats ISPs differently than other firms, even when engaging in similar activities, thereby preferentially treating one group of speakers and users of speech while disadvantaging another; it insufficiently considers the adverse effects that the Rules may have on consumers; it generally fails to offer an empirically sound basis for the Rules, as well as fails to address empirically sounds critiques of them; among other critiques. These issues will surely be taken up in other comments submitted in support of reconsideration – as, indeed, they were before the Commission when it initially adopted the Privacy Rules.

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[2] Federal Communications Commission, "In the Matter of Protecting the Privacy of Consumers of Broadband and Other Telecommunications Service," Report and Order (November 2, 2016).

The focus of the present comments, however, is narrower: in recent years conflicts between FTC and FCC jurisdiction have become increasingly problematic. The Commission's Privacy Rules both reflect and exacerbate these problems. As such, they should be reversed both because they exacerbate existing problems, and because future Congressional action and joint efforts between the FCC and FTC are likely to moot the recent rules.

Fundamentally, these comments are not opposed to privacy rules. Privacy-related concerns present real challenges to users, industry, the courts, and regulators today – these are hard and important issues. They are also inherently and incredibly different from, and more difficult than, the traditional CPNI-style privacy issues with which the Commission has substantial experience. Any sound approach to privacy regulation must be as consistent and simplifying as possible; creating new divisions between different classes of actors and legal rules and frameworks that govern them – and consequently further confusing an already uncertain legal and political landscape – should be an approach of last-resort, implemented only on the basis of clear, compelling, and not substantially controverted evidence.

I. Overlapping but divergent FCC and FTC jurisdiction

The FCC and FTC are "sister" agencies, having in many ways similar legal power to address consumer protection and competition issues. Their greatest difference – both practically and legally – stems from the statutory bar that prohibits the FTC from action relating to common carriers, on the one hand, and FCC's statutory jurisdictional limits. But-for either of these exemptions, and absent resource and expertise constraints, either agency could, as a legal matter, do almost everything that the other does.

As the Internet has blurred the distinction between traditional common carriage services and nouveau Internet-based services, the relationship between the FCC and FTC has become more important. Historically, consumer expectation and experience would be subject to consistent regulation by one agency or the other. It is only as the firms regulated by each agency have come to participate together in single markets that the prospect of differential regulation by each agency becomes possible. The Privacy Rules are a prime example of this: they set forth the FCC's approach to regulating how ISPs participate in the Internet advertising market, markets that are dominated by FTC-regulated firms like Google and Facebook.

These concerns are exacerbated by recent changes to the legal landscape, which have caused firms to shift between FCC and FTC jurisdiction, sometimes uncertainly. For instance, last year the 9th Circuit Court of Appeals interpreted the scope of the FTC's common carrier exemption broadly. Previously, firms offering common-carriage services were only exempt from FTC oversight to the extent that they offered such services; under the 9th Circuit's recent ruling, such firms are removed from FTC jurisdiction entirely.[3] Similarly, the FCC's 2015 Open Internet

[3] AT&T Mobility LLC. v. Fed. Trade Comm'n (9th Cir, 2016).

Order reclassified Broadband Internet Access Service providers as common carriers – removing them from FTC jurisdiction and placing them under FCC jurisdiction.

Such differences create harm and confusion for consumers and industry alike. Consumers expect that their information will be treated with care, without differentiating between whether that information is collected or used by an ISP or another firm in the ecosystem. Indeed, consumer understanding of the complex, and typically opaque, relationships between the myriad non-ISP firms that make up this ecosystem makes it far more difficult for consumers to understand how their information flows through it. But, as discussed below, the FCC's Privacy Rules place higher burdens on ISP members than on non-ISP members of this community. This frustrates consumer expectations. It also benefits those firms already in a stronger market position to act contrary to consumer interests, and places firms that could be a competitive check on such practices at a competitive disadvantage to those firms.

II. The Privacy Rules exacerbate the divide between the FCC and FTC

The FCC's Privacy Rules establish an "opt-in" privacy regime for ISPs, and in doing so break from longstanding understanding and practice. The FTC is the lodestar of privacy regulation in the United States. In its 2012 Privacy Report, the FTC embraces a notice-and-choice, opt-out, approach to consumer privacy.[4] This approach was evolved over more than a decade of experience both with regulating Internet-related privacy practices and engaging with the broad research community.

The FCC's opt-in approach marks a clear break from regulatory experience and practice and academic research. The FCC justifies this break on two primary grounds: first, that ISPs should be subject to different regulation than other firms in the Internet ecosystem; and second, that section 222 of the Communications Act requires that the Commission implement rules. The error of the Commission's view that ISPs require different regulatory treatment is most starkly captured by the FTC's Privacy Report, which explains that "any privacy framework should be technologically neutral. ISPs are just one type of large platform provider that may have access to all or nearly all of a consumer's online activity."[5]

The Commission's view that rules are required by section 222 is an even more substantial – and revealing – error. As an initial matter, the Commission argues that section 222 *requires* it to adopt rules. Longstanding administrative law precedent, however, makes clear that this is plainly erroneous.[6] Federal agencies retail broad discretion to develop statutory norms through

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[4] Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* (2012), at 48.

[5] *Id.* At 56.

[6] *Securities and Exchange Commission v. Chenery Corporation*, 332 U.S. 194, 202 ("Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rulemaking powers, it has less reason to rely upon ad hoc adjudication to formulate new standards of conduct … But any rigid requirement to that effect would make the administrative process inflexible and incapable of dealing with many of the specialized problems which arise. Not every principle essential to the effective administration of a

either *ex ante* rulemaking or *ex post* adjudication. Developing such norms to govern the conduct of highly-regulated firms in the face of evolving technological, social, and legal institutions is a canonical situation where case-by-case adjudication is preferable to *ex ante* rules.

More troubling is the Commission's apparent view that its extensive experience regulating the use of CPNI in traditional telephone networks provides it with sufficient, let along sophisticated, understanding of the privacy issues that arise in the context. This view is as delusional as it is wrong. The sorts of information and the uses of that information at issue in the modern context are only superficially similar to those presented by traditional CPNI. Consumer understanding of the relevant privacy issues is far greater – as is their ability to employ self-help to avoid and mitigate these concerns. And ISPs are relatively small players in competitive information and advertising markets – unlike in the traditional telephone context, where telephone companies have traditionally had substantial market power.

III. The Privacy Rules are built on a poor foundation

The argument above could be characterized as "The Privacy Rules are a House of Cards." The argument below is that they are building on a shifting foundation. Both the evolving relationship between the FCC and FTC and the uncertain future of the Commission's Open Internet Order have the potential to undermine – or simply erase – the Commission's Privacy Rules. Importantly, it has been the Commission's own aggressive approach to broadening the scope of its power that has driven this uncertainty. The Commission should focus its efforts of solidifying the foundation upon which rules such as the Privacy Rules are built before attempting to build upon that foundation.

Contrary to some Commissioners' and past Chairs' self-congratulatory rhetoric, the relationship between the FCC and FTC has never been as fraught as it is today. Firms are increasingly subject to overlapping, and at times contradictory, regulation by the agencies. This creates uncertainty for firms and consumers alike. It also creates legal uncertainty for the courts (for instance, by creating questions of how to interpret statutes or whether to afford agencies deference) and – in the rare case that the overwhelming costs of challenging agency action don't allow the agencies to simply browbeat firms into submission – legal uncertainty for the agencies themselves.

This is best seen in the recent 9th Circuit case interpreting the FTC's common carrier exemption broadly. This, combined with long-standing calls for Congress to revisit that exemption -- and potentially to eliminate it entirely – should call into question the ongoing and future dynamics

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statute can or should be cast immediately into the mold of a general rule. … To insist upon one form of action to the exclusion of the other is to exalt form over necessity. … [T]he agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards").

between the agencies. Rather than enacting aggressive regulations that exacerbate the differences between the FCC and FTC, the Commission's time would be better spent working to reconcile – ideally though Congress – the increasingly duplicative and conflicting roles of the agencies in modern Internet-focused industries.

Perhaps the most existential threat to the Privacy Rules is the continuing uncertainty surrounding the Open Internet Order. It is the Open Internet Order's reclassification of BIAS as a Title II common carriage service that took ISP privacy practices out from the ambit of the FTC and brought it within the ambit of the FCC and section 222.

There is a continuing likelihood that the Open Internet Order will be repealed and replaced by Congressional action. There is also a continuing possibility that the Order will be reviewed either by an *en banc* DC Circuit or the Supreme Court. Either of these events would likely moot the Privacy Rules – either replacing them or sending them back to the FTC.

The even greater threat to the Open Internet Order, however, -- and therefore the Commission's authority to regulate ISP privacy at all – is that the underlying basis of the Open Internet Order increasingly appears to be flawed. The purpose and justification for that Order was that the rules it put in place would drive a "virtuous cycle" of investment in Internet infrastructure. Recent analysis, however, suggests that the Open Internet Order has had the opposite effect, pushing capital investment out of the market.[7] This data is particularly important, because the DC Circuit Court of Appeal's decision to uphold the Open Internet Order was premised on deference to the Commission's judgment that the Open Internet rules would increase investment. If, as an empirical matter, that judgement proves to be in error, the Open Internet Order could presumably come toppling down – either being reversed by the Commission itself or by the courts in the context of an as-applied legal challenge. Should that future come to pass, the Privacy Rules would also necessarily fall.

The FCC's efforts in recent years to extract every bit of power out of its statutory authority have thoroughly fracked the ground on which the Commission's entire regulatory edifice is built. It is time the Commission realize the damage that it has done to its own foundation and focus on repairing and shoring it up. Reconsidering and repealing the Privacy Rules, and replacing them with a modest statement that it will follow the path laid out by the FTC in similar matters, approaching conduct of concern with a case-by-case, enforcement-based, approach would go a long way toward this goal.

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[7] *See* Hal Singer, *Bad Bet By FCC Sparks Capital Flight From Broadband*, Forbes.com (Mar. 2, 2017), https://www.forbes.com/sites/washingtonbytes/2017/03/02/capital-flight-from-broadband-in-the-title-ii-era.